

PUBLIC UTILITIES COMMISSION

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TO PARTIES OF RECORD IN CASE 15-12-020:

This is the proposed decision of Administrative Law Judge Kelly. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's September 15, 2016 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ RICHARD SMITH for
Karen V. Clopton, Chief
Administrative Law Judge

KVC:ek4
Attachment

Decision **PROPOSED DECISION OF ALJ KELLY** (Mailed 7/25/2016)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

O1 Communications, Inc. (U6065C),

Complainant,

vs.

New Cingular Wireless PCS, LLC (U3060C)
and AT&T Mobility Wireless Operations
Holdings, Inc. (U3021C),

Defendants.

Case 15-12-020
(Filed December 28, 2015)

DECISION GRANTING MOTION TO DISMISS COMPLAINT

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DECISION GRANTING MOTION TO DISMISS COMPLAINT

Summary

The Commission hereby grants New Cingular Wireless' PCS, LLC and AT&T Mobility Wireless Operations Holdings', Inc. (referred to jointly as AT&T Mobility Wireless for the remainder of this decision) Motion to Dismiss the Complaint filed by O1 Communications, Inc. (O1 Communications) on the ground that O1 Communications has failed to set forth a cause of action for which relief can be granted. Nothing in California or federal law or Commission orders requires AT&T Mobility Wireless to directly interconnect with O1 Communications network.

This proceeding is closed.

1. Procedural Background

On December 28, 2015, O1 Communications filed its Complaint and an expedited Motion for the issuance of a temporary restraining order (TRO Motion) against AT&T Mobility Wireless, seeking an Order to prohibit AT&T Mobility Wireless from disconnecting the direct connections between AT&T Mobility Wireless' network and O1 Communications' network. On January 19, 2016, AT&T Mobility Wireless filed its response to O1 Communications' TRO Motion. On January 25, 2016, AT&T Mobility Wireless filed its answer to O1 Communications' Complaint.

On January 29, 2016, the Administrative Law Judge (ALJ) held a Law and Motion hearing on O1 Communications' TRO Motion. The ALJ also conducted a prehearing conference (PHC) in this matter on January 29, 2016. On February 8, 2016, the ALJ issued a ruling denying O1 Communications' TRO Motion. On February 10, 2016, the assigned Commissioner issued the Scoping Memo and Ruling.

On February 26, 2016, AT&T Mobility Wireless filed a Motion to Dismiss the Complaint (Motion to Dismiss). On March 11, 2016, O1 Communications filed its Response to the Motion to Dismiss (Response to Motion to Dismiss). On March 25, 2016, AT&T Mobility Wireless filed its reply to O1 Communications' Response to Motion to Dismiss. On April 18, 2016, a Law and Motion hearing was held concerning AT&T Mobility Wireless' Motion to Dismiss.

2. Background

O1 Communications and AT&T Mobility Wireless¹ initially entered into a temporary traffic exchange agreement, which expired in 2011. The Parties attempted to negotiate a new long-term agreement for direct connections for several years, but were unable to come to an agreement. Unable to reach an agreement, AT&T Mobility Wireless informed O1 Communications that it would no longer directly interconnect with O1 Communications and advised O1 Communications that it would have to connect through indirect means. O1 Communications then filed its Complaint and TRO Motion. After the TRO Motion was denied, AT&T Mobility Wireless discontinued the direct connection between the Parties' networks.

2.1. The Complaint

In the Complaint, O1 Communications alleges four causes of action. The alleged causes of action are as follows: (1) Violation of California law and Commission orders that mandate the physical interconnection between networks and prohibit delaying or blocking telecommunications traffic; (2) Violation of California law requiring Public Utilities to act justly and reasonably in the

¹ Jointly referred to as the Parties.

provision of service; (3) Violation of California law that prohibits discrimination in the provision of service; and (4) Violation of California law that removes barriers to competition.

2.2. AT&T Mobility Wireless' Answer and Motion to Dismiss the Complaint

On January 25, 2016, AT&T Mobility Wireless filed its answer to the Complaint and denies any wrongdoing. AT&T Mobility Wireless contends that the Commission must grant its Motion to Dismiss on the grounds that O1 Communications' Complaint fails to state a claim for which relief may be granted. Additionally, as will be discussed in more detail below, AT&T Mobility Wireless also elaborates in its Motion to Dismiss why each of O1 Communications' causes of action must fail.

3. Standards for Ruling on a Motion to Dismiss

3.1. The First Standard: Do the Undisputed Facts Require the Commission to Rule in the Moving Party's Favor as a Matter of Law?

In *Raw Bandwidth Communications, Inc. v. SBC California, Inc. and SBC Advanced Solutions, Inc. (Raw Bandwidth)*, the Commission stated that a Motion to Dismiss "requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice."² A motion for summary judgment is appropriate where the evidence presented indicates there are no triable issues as to any

² (2003) Decision (D.) 03-05-023 (*Scoping Memo and Ruling of Assigned Commissioner on Motion to Dismiss and Preliminary Matters* at 3, citing to *Westcom Long Distance, Inc. v. Pacific Bell et al.*, Decision (D.) 94-04-082, 54 CPUC 2d 244, 249).

material fact, and that based on the undisputed facts, the moving party is entitled to judgment as a matter of law. (California Code of Civil Procedure, § 437(c); Weil & Brown, *Civil Procedure Before Trial*, 10:26-27). While there is no express Commission rule for the basis for granting summary judgment motions, the Commission looks to § 437(c) for the standards on which to decide a motion for summary judgment. (*Id.*)³ Section 437(c) provides:

The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers ... and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact.

A further beneficial purpose of such a motion is “that it promotes and protects the administration of justice and expedites litigation by the elimination of needless trials.” (*Westcom Long Distance, supra*, 54 CPUC2d, 249). As such, where appropriate, the Commission regularly grants motions for summary judgment or summary adjudication. (*See* Decision (D.) 07-07-040 [granting Chevron judgment against Equilon “as a matter of law”]; Decision (D.) 07-01-004 [granting Cox Telecom judgment against Global NAPs of California]; and Decision (D.) 02-04-051 [granting summary adjudication of a claim by County Sanitation District against Southern California Edison]).

³ See *Westcom, supra*, 54 CPUC 2d, 249-250.

3.2. The Second Standard: Is Defendant Entitled to Prevail Even if the Complaint's Well-Pleaded Allegations are Accepted as True?

In *Re Western Gas Resources-California, Inc.*, (1999) Decision (D.) 99-11-023, we articulated another standard for dismissing complaints and applications that is slightly different than what was adopted in *Raw Bandwidth*:

On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law. (e.g., *MCI Telecommunications Corp. v. Pacific Bell*, Decision (D.) 95-05-020, 59 Cal. PUC 2d 665, 1995 Cal. PUC LEXIS 458, at *29-*30, citing *Burke v. Yellow Cab Co.* (1973) 76 Cal. PUC 166), 3 CPUC 3d, 301.)

This standard was employed more recently in *Everyday Energy Corporation v. San Diego Gas & Electric Company*, (2012) Decision (D.) 12-03-037, wherein the Commission added: "By assuming that the facts as alleged in the complaint are true for the purpose of deciding whether to grant a motion to dismiss, we assume that complainant will be able to prove everything alleged in its complaint." (Slip Op., 7.)

In determining if the complainant's allegations are "well pleaded," we are guided by the standards set forth in Pub. Util. Code § 1702, which provides that the complainant must allege that a regulated utility has engaged in an act or failed to perform an act in violation of any law or Commission order or rule:

Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for

any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission...

As demonstrated by past precedent, the Commission will dismiss a complaint that fails to meet this two-pronged standard. (*See Monkarsh v. Southern California Gas Company*, (2009) Decision (D.) 09-11-017; *Pacific Continental Textiles, Inc. v. Southern California Edison Company*, (2006) Decision (D.) 06-06-011; *Watkins v. MCI_Metro Access Transmission Services*, (2005) Decision (D.) 05-03-007; *Rodriguez v. Pacific Gas and Electric Company*, (2004) Decision (D.) 04-03-010; *AC Farms Sheerwood v. So. Cal Edison*, (2002) Decision (D.) 02-11-003; and *Crain v. Southern California Gas Company*, (2000) Decision (D.) 00-07-045.)

4. The Undisputed Facts Establish that the Complaint Fails to State a Claim for Which Relief May be Granted and the Motion to Dismiss Must be Granted as a Matter of Law

O1 Communications has failed to set forth any law or Commission order or rule that AT&T Mobility Wireless has violated. As such, AT&T Mobility Wireless is entitled to have O1 Communications' Complaint dismissed as a matter of law. Furthermore, nothing in federal law requires AT&T Mobility Wireless to directly interconnect with O1 Communications.

4.1. First Cause of Action: Violation of California Law and Commission Orders that Mandate the Physical Interconnection Between Networks and Prohibit Delaying or Blocking Telecommunication Traffic

To support this Cause of Action, O1 Communications argues that AT&T Mobility Wireless is violating Pub. Util. Code § 558 and D.97-11-024. Neither of these authorities supports the allegations raised in O1 Communications' First Cause of Action.

Pub. Util. Code § 558 states:

Every telephone corporation and telegraph corporation operating in this State shall receive, transmit, and deliver, without discrimination or delay, the conversations and messages of very other such corporation with whose line a physical connection has been made.

As noted above, the Parties previously had an interconnection agreement which expired in 2011. Among other things, the interconnection agreement provided for direct connection between AT&T Mobility Wireless' and O1 Communications' networks.

For nearly four years the Parties attempted to negotiate a successor agreement. After several years and numerous failed attempts to reach a new interconnection agreement, AT&T Mobility Wireless informed O1 Communications that it would no longer directly connect with O1 Communications' network. At that time, O1 Communications was advised that it would have to connect to AT&T Mobility Wireless' network via indirect connections.

O1 Communications provided no evidence to establish that AT&T Mobility Wireless is refusing to receive, transmit or deliver conversations and messages between its network and O1 Communications' network. In fact, the undisputed facts establish the contrary. AT&T has never failed to "receive, transmit and deliver" O1 Communications' traffic "without discrimination or delay." Additionally, in none of its pleadings or oral arguments does O1 Communications state that AT&T Mobility is refusing to connect by indirect means. O1 Communications simply argues that Pub. Util. Code § 558 requires that AT&T Mobility Wireless directly connect with its network. Nothing in Pub. Util. Code § 558 requires a direct connection between networks.

O1 Communications also argues that AT&T Mobility Wireless is in direct violation of D.97-11-024. In its Complaint, O1 Communications contends that D.97-11-024 mandates that “all carriers are entitled to have their calls routed and completed by other carriers in the manner they have requested... [without nullification] by disputes over intercarrier compensation arrangements, disputes over tariff violations, or other areas of disagreement.”⁴ Again, O1 Communications’ argument is off point.

D.97-11-024 involved a dispute between Pac-West Telecomm, Inc. (Pac-West) and two other Local Exchange Carriers (LECs) who refused to complete calls originating on Pac-West’s network “because the geographic routing coordinates of the associated NXX codes did not match their rate center coordinates used for billing purposes.”⁵ D.97-11-024 discusses a carriers’ obligation to complete and not selectively block or misdirect calls.

O1 Communications’ Complaint has nothing to do with refusal to complete calls. O1 Communications can still direct calls to AT&T Mobility Wireless’ network. However, O1 Communications must now do so indirectly.

As noted in the ALJ’s Ruling denying the TRO Motion:

O1 Communications’ reliance on D.97-11-024 as support for the Commission to issue the restraining order is also flawed. Nothing in D.97-11-024 requires AT&T Mobility to maintain a direct connection with O1 Communications. Furthermore, there is no evidence that AT&T Mobility is refusing calls from O1 Communications. AT&T Mobility is simply refusing to allow O1 Communications to continue to have a direct connection with AT&T Mobility because the parties have been

⁴ Complaint at Paragraphs 19-21, 59-61.

⁵ D.97-11-024, *mimeo*, at 1, footnote (fn.) 1.

unable to reach an agreement to do so. O1 Communications can still route traffic to AT&T Mobility's network, it will simply have to do so through indirect means.⁶

Furthermore, in D.97-11-024, the Commission contemplates indirect interconnection under Section 251(a) of the 1996 Telecommunications Act as satisfying a carrier's obligation to complete calls under Pub. Util. Code § 558 to "receive, transmit, and deliver" traffic "without discrimination or delay."⁷

4.1.1. Federal Law Regarding Direct Interconnection

Although it is clear that California law does not require a direct interconnection, it is also necessary to evaluate whether there is a requirement to do so under federal law. 47 USC § 251 is titled Interconnection, and it sets forth various federal standards for interconnection between telecommunication carriers. There are three distinct classifications set forth in 47 USC § 251.

The first is § 251(a). Section 251(a) of the 1996 Telecommunications Act imposes a general duty upon telecommunication carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers ..." The second is § 251(b), which applies to all LECs.⁸ There are more obligations imposed on LECs as it relates to interconnection. One such requirement is found in § 251(b)(5), which imposes a reciprocal compensation arrangement. The third requirement pertains to Incumbent Local Exchange Carriers (ILEC) and is found at § 251(c). Under

⁶ TRO Ruling at 8.

⁷ D.97-11-024 at 5, 7.

⁸ AT&T Mobility Wireless is a Commercial Mobile Radio Service (CMRS) provider and O1 Communications is a Competitive Local Exchange Carrier (CLEC).

federal law, the ILECs must interconnect at any feasible point and they must arbitrate interconnection agreements with other ILECs.

Shortly after the passage of the 1996 Telecommunications Act, the Federal Communications Commission (FCC) released a First Report and Order on August 8, 1996 (FCC 96-325). In this First Report and Order, the FCC discussed CMRS providers and obligations of LECs under §251(b) and ILECs under §251(c). The FCC clearly states:

We are not persuaded by those arguing that CMRS providers should be treated as LECs... CMRS providers should not be classified as LECs until the Commission makes a finding that such treatment is warranted... Because the determination as to whether CMRS providers should be defined as LECs is within the Commission's sole discretion, states are preempted from requiring CMRS providers to classify themselves as "local exchange carriers" ...⁹

On July 24, 2000, the FCC released its Fourth Report and Order (FCC 00-253). This Report and Order addresses whether facility-based CMRS providers should be required to interconnect with CMRS resellers' switches or with each other's networks. In this matter, the FCC states:

We have not been persuaded by the commenters that we should revise our rules or require mandatory interconnection at this time. As noted above, in the *Local Competition First Report and Order*, we determined that indirect interconnection (e.g., two carriers other than incumbent LECs connecting with an incumbent LECs network) is all that is required by the 1996 Act.¹⁰

On November 18, 2011, the FCC released 11-161. In this matter, the FCC

⁹ FCC 96-325 at paragraph 1004.

¹⁰ FCC 00-253 at paragraph 28.

states:

We decline, at this time, to extend the obligations enumerated in the *T-Mobile Order* to other contexts. As discussed above, the *T-Mobile Order* imposed on CMRS providers the duty to negotiate interconnection agreements with incumbent LECs under the section 252 framework. However, the *T-Mobile Order* did not address relationships involving competitive LECs or among other interconnecting service providers. Subsequently, competitive LECs have requested that the Commission expand the scope of the *T-Mobile Order* and require CMRS providers to negotiate agreements with competitive LECs under the section 251/252 framework, just as they do with incumbent LECs.¹¹

As noted above, AT&T Mobility Wireless is a CMRS provider. Nothing in §251(a) requires AT&T Mobility Wireless to interconnect directly with O1 Communications. In fact, the law clearly states that the interconnection may be “directly or indirectly.” Since AT&T Mobility Wireless is a CMRS provider, only §251(a) is applicable. Additionally, as stated above, the FCC has made clear that indirect interconnection is all that is required by the 1996 Telecommunications Act. Accordingly, we find that nothing in federal law requires AT&T Mobility Wireless to directly interconnect with O1 Communications.

4.2. Second Cause of Action: Violation of California Law Requiring Public Utilities to Act Justly and Reasonably in the Provision of Service

O1 Communications contends that AT&T Mobility Wireless’ decision to no longer directly connect with O1 Communications’ network violates the provisions of Pub. Util. Code § 451. Pub. Util. Code § 451 states as follows:

¹¹ FCC 11-161 at paragraph 845.

All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

O1 Communications' argument that indirect connection somehow constitutes the failure to act "justly and reasonably in the provision of service" is flawed. In both its filed papers and oral arguments, O1 Communications fails to state as a matter of law how AT&T Mobility Wireless is required to directly connect with O1 Communications.

The courts have concluded that pursuant to standard rules of statutory interpretation code sections should be read to avoid constitutional questions, such as federal preemption. In *People v. Huy Ngoc Nguyen* (2010) 184 Cal.App.4th 1096, 1110 the court notes "Where possible, we construe the statute 'so as to avoid absurd or unreasonable results'" (*Miller v. Collectors Universe, Inc.* (2008), 159 Cal.App.4th 988], 999) and to " 'avoid [] serious constitutional questions' " (*Elkins v. Superior Court* 2007) 41 Cal.4th 1337, 1357).

O1 Communications fails to establish how indirect connection is an act that constitutes the failure to act justly and reasonably. Furthermore, at no point does O1 Communications contend that AT&T Mobility Wireless refuses to connect to O1 Communications' network via indirect means. Finally, as set forth above in

§§ 4.1 and 4.1.1, as a matter of law AT&T Mobility Wireless is not required to provide direct interconnection if it provides indirect interconnection. Therefore, the second cause of action fails because O1 Communications has failed to establish that AT&T Mobility Wireless' decision to connect to O1 Communications' network via indirect means constitutes a failure to act justly and reasonably.

4.3. Third Cause of Action: Violation of California Law that Prohibits Discrimination in the Provision of Service

O1 Communications believes that AT&T Mobility Wireless has violated California law that prohibits discrimination in the provision of service. O1 Communications relies on Pub. Util. Code § 453(a) to support its allegation. O1 Communications Complaint argues that Pub. Util. Code § 453(a) prohibits public utilities from making or granting any preference or advantage to any person or corporation with regard to services, facilities, or in any other respect.¹²

Pub. Util. Code § 453(a) provides:

No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

O1 Communications fails to establish how AT&T Mobility Wireless' decision to interconnect with O1 Communications through indirect means equates to discrimination in the provision of service. O1 Communications argument is that because AT&T Mobility Wireless allows other telecommunication carriers to directly interconnect with AT&T Mobility

¹² Complaint at Paragraph (¶) 75.

Wireless, but not O1 Communications, therefore, AT&T Mobility Wireless is discriminating against O1 Communications.

What O1 Communications fails to acknowledge is that if AT&T Mobility Wireless is interconnecting directly with other telecommunication providers, it is because AT&T Mobility Wireless has an agreement with the other providers to do so. AT&T Mobility Wireless would interconnect directly with O1 Communications if the Parties were able to reach an agreement. O1 Communications itself admits in its Complaint that AT&T Mobility Wireless has offered to continue to directly connect with O1 Communications, but the parties much reach an agreement to do so.¹³

To support its contention that AT&T Mobility is discriminating against O1 Communications, O1 submitted the testimony of James Mertz, who contends AT&T Mobility offers direct connection trunks to other carriers.¹⁴ Based on this fact, Mr. Mertz concludes in his testimony that “AT&T Mobility is discriminating against O1 by disconnecting all direct connection facilities with O1 while continuing to offer direct connection to other carriers.”¹⁵

AT&T Mobility submitted the testimony of Lawrence J. Bax, who testifies that, to the best of his knowledge, AT&T Mobility does not establish direct interconnection facilities with any carrier “in the absence of an agreement for those facilities.¹⁶ Mr. Bax’s responses to question 14 and 15 in the confidential version of his testimony provides an exhaustive discussion of the negotiations

¹³ Complaints at ¶ 47 and 48.

¹⁴ Mertz Opening Testimony at 14.

¹⁵ Mertz Opening Testimony at 14.

¹⁶ Bax Opening Testimony, Confidential Version at 6.

that took place between the parties for over four years as they attempted to reach an agreement to exchange traffic over direct interconnection facilities.¹⁷

Furthermore, the testimony of Mr. Bax goes into extensive detail concerning the rates that AT&T Mobility offered O1 Communications during the period of negotiations.¹⁸

Answer 21 of Mr. Bax's testimony discusses the rates, terms and conditions offered to O1 Communications compared to other similarly situated providers. Mr. Bax states as follows: "The rates, terms, and conditions offered to O1 during the negotiations from the onset of negotiations through December 2015 were substantively similar to rates, terms, and conditions offered to other transit carriers like O1."¹⁹

AT&T Mobility Wireless does not have a legal duty to directly interconnect with O1 Communications absent an agreement. Here, the Parties have attempted to reach an agreement for many years that would allow the Parties to continue to interconnect directly. However, they have failed to reach an agreement that would allow this to continue. Absent an agreement to do so, AT&T Mobility Wireless is well within the law to require O1 Communications to interconnect with its network via indirect means. Again, O1 Communications has failed to establish that AT&T has violated Pub. Util. Code § 453(a).

We find that O1 Communications has failed to establish that AT&T Mobility engaged in discriminatory practices when it terminated the direct connection between the two carriers' respective networks. At the same time, this

¹⁷ Bax Opening Testimony, Confidential Version at 13.

¹⁸ Bax Opening Testimony, Confidential Version at 14-15.

¹⁹ Bax Opening Testimony, Confidential Version at 17.

finding based on the facts presented here does not bar another carrier from bringing a claim to establish discriminatory behavior in a future proceeding where a service provider terminates direct interconnection.

4.4. Fourth Cause of Action: Violation of California Law that Removes Barriers to Competition

O1 Communications Complaint alleges that AT&T Mobility Wireless is in violation of Pub. Util. Code § 709(f) and (g). Pub. Util. Code § 709 states in relevant part:

The Legislature hereby finds and declares that the policies for telecommunications in California are as follows:

(f) To promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct.

(g) To remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice.

Again, O1 Communications fails to provide evidence as to specifically how AT&T Mobility is in violation of Pub. Util. Code § 709(f) and (g). As consistently noted throughout this Decision, nothing in either state or federal law compels AT&T Mobility Wireless to directly interconnect with O1 Communications. There cannot be a violation of the law if there is not an affirmative duty imposed upon AT&T Mobility Wireless.

None of the cases cited by O1 Communications compels a direct connection between a CMRS provider and CLEC. Furthermore, counsel for O1 Communications admitted at the law and motion hearing concerning the Motion to Dismiss that “[t]he California Commission has not yet specifically decided whether competitive carriers including wireless carriers are required

to directly interconnect. It's an issue of first impression."²⁰ Accordingly, O1 Communications agrees that the law does not compel AT&T Mobility Wireless to interconnect directly with its network.

O1 Communications has failed to establish that AT&T Mobility Wireless has an affirmative duty to interconnect directly with O1 Communications. The fact that counsel for O1 Communications admits that this is an issue of first impression before the Commission proves that as a matter of law, AT&T Mobility Wireless is not required to interconnect directly. As such, the undisputed facts establish that AT&T Mobility Wireless has not violated the law and therefore the Motion to Dismiss must be granted as a matter of law.

5. Even if the Commission Assumed that the Complaint's Allegations are True, the Complaint's Procedural and Legal Defects Require that it be Dismissed

As set forth in § 3.2 above, the second standard for granting a motion to dismiss requires that the Commission evaluate whether the defendant is entitled to prevail even if the complaint's well-pleaded allegations are accepted as true. To determine whether the complaint's allegations are "well pleaded," we are guided by the standards set forth in Pub. Util. Code § 1702, which mandates that the complainant must allege that a regulated utility has engaged in an act or failed to perform an act in violation of any law or Commission order or rule.

The whole premise of this Complaint revolves around the first cause of action. The first cause of action contends that AT&T Mobility Wireless is in violation of California law and Commission orders that mandate the physical

²⁰ Law and Motion Hearing Transcript, Volume 2, page 61, lines 2-6 (April 18, 2016).

interconnection between networks. The remaining alleged causes of action in this Complaint are all a direct result of the first cause of action.

Employing the second standard for deciding whether a Motion to Dismiss must be granted leads us to the same conclusion that this Complaint must be dismissed. The assumed truth of the factual allegations cannot alter the fact that California law does not mandate the direct interconnection between networks. As admitted by O1 Communications during the law and motion hearing, the issue presented in this Complaint as it relates to direct interconnection of networks is an issue of first impression before this Commission. Since this is an issue of first impression, O1 Communications concedes that there are no Commission orders relating to direct interconnection that AT&T Mobility Wireless could be in violation of. As set forth in § 4.1.1 above, as a CMRS provider pursuant to federal law, AT&T Mobility Wireless is not required to directly interconnect with O1 Communications' network.

As noted above, the complaint must be "well-pleaded." Pub. Util. Code § 1702, which guides our determination of whether a complaint is "well-pleaded" mandates that the complaint must establish that AT&T Mobility Wireless has engaged in an act in violation of any law or Commission rule or order. There is no law or Commission order that requires AT&T Mobility Wireless to directly interconnect with O1 Communications' network. Therefore, AT&T Mobility Wireless' Motion to Dismiss must be granted.

It is also important to note that a complaint action is not the appropriate venue to make wide-reaching policy determinations that could have an impact on virtually every other telecommunication provider regulated by this Commission. The only parties to this complaint are AT&T Mobility Wireless and O1 Communications. If the Commission were to compel direct interconnection

in this complaint proceeding, it would potentially be setting precedent that could compel other telecommunication providers to directly interconnect. This could potentially result in a violation of the due process rights of the other telecommunication providers who are not parties to this proceeding.

Therefore, as a matter of law, O1 Communications' complaint fails to state a cause of action for which relief can be granted and AT&T Mobility Wireless' Motion to Dismiss must be granted. The Complaint is dismissed with prejudice.

6. Request to File Under Seal

Pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure, O1 Communications filed motions on December 28, 2015, March 11, 2016 and July 5, 2016 for leave to file confidential portions of the Complaint and motion for TRO, Exhibits B, C, and D of the Complaint and Exhibits 1, 4, 5, 7, and 9 of its motion to compel as confidential materials under seal. On January 25, 2016, AT&T Mobility Wireless filed a motion for leave to file confidential portions of its answer to the Complaint as confidential materials under seal. The Parties represent that the information is sensitive, and disclosure could place the Parties at an unfair business disadvantage. We have granted similar requests in the past and do so here.

7. Categorization and Need for Hearing

This proceeding is categorized as adjudicatory. In the Scoping Memo and Ruling it was preliminarily determined that hearings would be necessary in this proceeding. However, because we have determined that the complaint must be dismissed as a matter of law, there is no need for evidentiary hearings.

8. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with § 311 of the Pub. Util. Code and

comments were allowed under rule 14.3 of the Commission's Rules of Practice and Procedure.

9. Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and Gerald F. Kelly is the assigned ALJ in this proceeding.

10. Safety Considerations Pursuant to Pub. Util. Code § 451

Pub. Util. Code § 451 requires that every public utility must maintain adequate, efficient, just and reasonable service to promote the "safety, health, comfort, and convenience of its patrons, employees, and the public." At no point in this proceeding has there been an allegation of any safety concerns. We have evaluated the Complaint and conclude that there are no safety issues pursuant to Pub. Util. Code § 451 which must be evaluated.

Findings of Fact

1. On December 28, 2015, O1 Communications filed the instant Complaint against AT&T Mobility Wireless.

2. On January 25, 2016, AT&T Mobility Wireless filed its answer to the Complaint.

3. On February 26, 2016, AT&T Mobility Wireless filed the Motion to Dismiss.

4. AT&T Mobility Wireless is a CMRS provider.

5. O1 Communications is a CLEC.

6. The first cause of action in the Complaint asks that the Commission compel AT&T Mobility Wireless to directly interconnect with O1 Communications' network pursuant to Pub. Util. Code § 558.

7. AT&T Mobility Wireless has not delayed or blocked telecommunication traffic originating on O1 Communications network and connecting to AT&T Mobility Wireless' network.

8. The remaining causes of action are dependent upon O1 Communications successfully prevailing on the first cause of action.

9. Nothing in California or federal law or Commission orders compels a CMRS provider to directly interconnect with the network of a CLEC.

10. O1 Communications can connect with AT&T Mobility Wireless, network through indirect connection.

11. O1 Communications has failed to establish that AT&T Mobility engaged in discriminatory practices when it terminated the direct connection between the two carriers' respective networks.

12. Findings of Fact Number 11 is based on the facts presented here and does not bar another carrier from bringing a claim to establish discriminatory behavior in a future proceeding where a service provider terminates direct interconnection.

Conclusions of Law

1. The Complaint is procedurally defective because it fails to set forth a cause of action for which relief can be granted.

2. O1 Communications erroneously interprets Pub. Util. Code § 558 to compel AT&T Mobility Wireless, which is a CMRS provider, to directly interconnect with O1 Communications network.

3. O1 Communications erroneously interprets D.97-11-024 to require AT&T Mobility Wireless to maintain a direct connection with O1 Communications' network.

4. AT&T Mobility Wireless' decision to connect with O1 Communications network via indirect connection has not resulted in AT&T Mobility Wireless delaying or blocking telecommunication traffic from O1 Communications.

5. Nothing in California or federal law or Commission orders requires a CMRS provider such as AT&T Mobility Wireless to directly connect with a CLEC provider such as O1 Communications.

6. O1 Communications has failed to establish that AT&T Mobility engaged in discriminatory practices when it terminated the direct connection between the two carriers' respective networks.

7. Conclusions of Law Number 6 is based on the facts presented here and does not bar another carrier from bringing a claim to establish discriminatory behavior in a future proceeding where a service provider terminates direct interconnection.

8. The Complaint must be dismissed for failure to state a cause of action for which relief can be granted.

9. Hearings are not necessary.

O R D E R

IT IS ORDERED that:

1. The motion of AT&T Mobility Wireless to dismiss the Complaint for failing to state a cause of action is granted.

2. The Complaint filed by O1 Communications is dismissed.

3. No hearings are necessary.

4. Case 15-12-020 is closed.

5. The December 28, 2015, March 11, 2016 and July 5, 2016 motions of O1 Communications, Inc. (O1 Communications) to file under seal confidential portions of the Complaint and motion for Temporary Restraining Order (TRO) and Exhibits B, C, and D of the Complaint and Exhibits 1, 4, 5, 7, and 9 of its motion to compel as confidential materials under seal is granted for a period of three years after the date of this order. During this three-year period, the

information in the confidential portions of the Complaint and motion for TRO, Exhibits B, C, and D of the Complaint and Exhibits 1, 4, 5, 7, and 9 of its motion to compel shall not be publicly disclosed except on further Commission order or Administrative Law Judge ruling. If O1 Communications believes that it is necessary for this information to remain under seal for longer than three years, O1 Communications may file a new motion showing good cause for extending this order by no later than 30 days before expiration of this order.

6. The January 25, 2016 motion of New Cingular Wireless PCS, LLC and AT&T Mobility Wireless Operations Holdings, Inc. (jointly referred to as AT&T Mobility Wireless) to file under seal confidential portions of the answer to the Complaint is granted for a period of three years after the date of this order. During this three-year period, the information in the confidential portions of the answer to the Complaint shall not be publicly disclosed except on further Commission order or Administrative Law Judge ruling. If AT&T Mobility Wireless believes that it is necessary for this information to remain under seal for longer than three years, AT&T Mobility Wireless may file a new motion showing good cause for extending this order by no later than 30 days before expiration of this order.

This order is effective today.

Dated _____, at San Francisco, California.